SUPREME COURT, U. S.

In the Supreme Court

OCTOBER TERM, 1975

EDWARD JAMES FRANDSEN, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

ERWIN N. GRISWOLD,

PHILIP A. LOOMIS, JR.,
General Counsel,

RAYMOND J. FONSECA,
Attorney,

Securities and Exchange Commission,

# In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 354

HOWARD JAMES HANSEN, PETITIONER

*v.*

SECURITIES AND EXCHANGE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. 7–8) is not officially reported. The opinion of the Securities and Exchange Commission, Securities Exchange Act Release No. 8118, is also unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 30, 1968. A petition for rehearing was denied on June 5, 1968. The petition for a writ of certiorari was filed on July 29, 1968. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).



318-217—68

## QUESTION PRESENTED

Whether petitioner was denied a fair hearing by the admission into evidence of the record of a prior administrative proceeding involving the same issues and the identical parties, when petitioner declined an opportunity to participate as a party in the prior proceeding and was given an opportunity to, and did cross-examine the witnesses whose testimony was contained in the record of the prior proceeding.

## STATEMENT

On January 24, 1963, the Securities and Exchange Commission instituted a consolidated administrative proceeding to determine whether to take disciplinary action against Atlantic Equities Company (Atlantic) and seven other securities brokers and dealers registered with the Commission. All eight firms were alleged to have manipulated the market for a "hot issue" of a low-priced stock underwritten by Atlantic (R. 10166–10170).[1] Twelve individuals associated with these broker-dealer firms—including petitioner Hansen, who had been the manager of Atlantic's underwriting department—were charged with personal responsibility for the alleged market manipulation and accepted the Commission's offer to appear in the proceeding to answer that charge (R. 10213–10216, 10225–10226).[2] On October 28, 1963, while he was participat-

[1] Section 15(b)(5)(D) of the Securities Exchange Act of 1934, 15 U.S.C. 78*o*(b)(5)(D), authorizes the Commission to discipline registered broker-dealers that have engaged in willful violations of the federal securities laws.

[2] At the time of the instant proceeding, the Commission had no statutory authority to bring disciplinary proceedings against

ing in the disciplinary proceeding, Hansen filed with the Commission an application for registration as a broker-dealer (R. 10280–10285). The Commission then instituted another administrative proceeding to determine whether Hansen's application should be denied, and that proceeding was consolidated for hearing with the disciplinary proceeding (R. 10286–10292, 10301–10302).[2]

On July 11, 1967, the Commission found, *inter alia*, that Atlantic had engaged in a market manipulation, and revoked its broker-dealer registration. The Commission also found that Hansen was "one of the principal architects of the scheme" and was a cause of the sanction imposed on Atlantic, and it denied his application for registration (J.A. 58–62, R. 10630–10632).

Hansen petitioned for review of the Commission's decision, claiming error in the admission into evidence of the record of a prior disciplinary proceeding involving the same market manipulation. The court of appeals affirmed *per curiam* (Pet. 7–8).

The prior proceeding had been instituted by the Commission on November 24, 1961, against Atlantic and the same seven other broker-dealers (R. 10050–

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individuals associated with registered broker-dealers. *Wallach* v. *Securities and Exchange Commission*, 202 F. 2d 462 (C.A. D.C.). Since the decision in such a proceeding might nevertheless adversely affect such individuals, the Commission followed the policy of offering them an opportunity to participate in the proceeding if they so desired. Former Rule 15b-9(b), 20 Fed. Reg. 7036 (1955).

[2] Section 15(b)(5)(E) of the Securities Exchange Act of 1934, 15 U.S.C. 78o(b)(5)(E), authorizes the Commission to deny a broker-dealer application of any person who has willfully participated in a violation of the federal securities laws.

10057). Hansen, together with the same other individuals, was charged with personal responsibility for the market manipulation and was advised of his privilege to participate as a party (J.A. 11–12, R. 9822). On the first day of the hearings, Hansen's counsel stated that his client had elected not to participate as a party (J.A. 98, R. 3227). That afternoon, on the motion of the Commission's staff to sequester the witnesses, and without objection by Hansen or his counsel, the examiner ruled that Hansen could not sit in the hearing room until he was called as a witness; his counsel was allowed to remain, but chose not to do so (J.A. 99, R. 3262). Hansen testified at length concerning his participation in the underwriting, but at no time did Hansen or his counsel seek leave to attend the hearing (J.A. 22). After forty-one days of hearings, Atlantic and other participants moved to terminate the proceeding because of a possible procedural defect.[4] The motion was granted on December 21, 1962, without prejudice to institution of a new proceeding based on the same charges (J.A. 15–16). At that time, the record consisted of nearly 5000 pages of testimony and over 300 exhibits (J.A. 70, R. 179).

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[4] In *Amos Treat & Co.* v. *Securities and Exchange Commission*, 306 F. 2d 260, decided during the course of the first proceeding, the Court of Appeals for the District of Columbia Circuit invalidated a broker-dealer proceeding because a Commissioner who participated in the decision had been a member of the staff when the matter was being investigated. The same Commissioner participated in the institution of the first proceeding involving Atlantic and Hansen, but he did not participate in the proceeding under review here.

At the outset of the proceeding under review here, Hansen's counsel stated that his client had elected to participate as a party in this proceeding (J.A. 68–69, R. 15). The Commission's staff introduced the record of the prior proceeding, with the understanding that Hansen would "be able to cross-examine any or all of the witnesses" who had testified in the prior proceeding (J.A. 70, R. 179). This record was admitted into evidence over Hansen's objection, and the Commission sustained the hearing examiner's ruling on an interlocutory application for review (J.A. 19–23, R. 10307–10308). At Hansen's request, numerous witnesses from the prior proceeding were recalled, and Hansen, although no longer represented by counsel, cross-examined most of them (J.A. 75–79, 82–86, 91–96; R. 927–928, 933–936, 1320–1324, 1345–1346, 1863–1870).[5]

## ARGUMENT

As noted above, a record consisting of nearly 5000 pages of testimony and over 300 exhibits had been compiled in the earlier proceeding involving the same parties and the same market manipulation. The Commission's staff could have prolonged the subsequent proceeding by calling each of the 40 witnesses who had previously testified and asking them the same questions. And to the extent that a witness could not fully recall the events, his memory could have been refreshed by his prior testimony. So long as petitioner's right to a fair hearing was preserved, it was

[5] Petitioner does not cite any part of the record to support his claim that these witnesses "had no substantial memory, as to the events * * *" (Pet. 4).

plainly within the Commission's discretion to avoid such a cumbersome and unnecessary procedure by admitting the testimony received at the prior hearing. See *Paramount Cap Mfg. Co.* v. *National Labor Relations Board,* 260 F. 2d 109 (C.A. 8); *Railway Express Agency* v. *Civil Aeronautics Board,* 243 F. 2d 422 (C.A.D.C.); *In re McNary,* 83 F. Supp. 121 (N.D.N.Y.).

The common-law evidentiary rules with respect to the admissibility of prior testimony in a subsequent judicial proceeding are not necessarily applicable in administrative proceedings. See *Federal Trade Commission* v. *Cement Institute,* 333 U.S. 683, 705–706. Moreover, the exclusion of such hearsay testimony, except in certain circumstances, in a judicial proceeding, is founded on the notion that it is unfair to deny the party against whom the evidence is offered an opportunity to test its trustworthiness by cross-examining the witness. Compare *Pointer* v. *Texas,* 380 U.S. 400, 404–405. Since petitioner had an ample opportunity to, and did, cross-examine the witnesses from the earlier proceeding, no unfairness resulted from the admission of the witnesses' prior testimony. See *Freight Consolidators Cooperative, Inc.* v. *United States,* 230 F. Supp. 692 (S.D.N.Y.).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

PHILIP A. LOOMIS, JR.,
*General Counsel,*

DAVID FERBER,
*Solicitor,*

DONALD M. FEUERSTEIN,
*Special Counsel,*

FRANK N. FLEISCHER,
*Attorney,*
*Securities and Exchange Commission.*

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